APPENDIX A.

Opinion of the
United States Court of Appeals
For the Eighth Circuit.

No. 18,218.

Holden Brown, George House and George Wolff,
Appellants,
v.
Sterling Aluminum Products Corporation, a Missouri Corporation,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[September 12, 1966.]

Before VAN OOSTERHOUT, BLACKMUN and GIBSON, Circuit Judges.

GIBSON, Circuit Judge.

The appellants, Holden Brown, George House and George Wolff, as plaintiffs filed a complaint in the District Court for the Eastern District of Missouri, against Sterling Aluminum Products Corporation (hereinafter referred to as "Company"), a Missouri corporation, engaged in activities which affect interstate commerce under the provisions of the Labor Management Relations Act, 1947

(Act) 29 U. S. C., § 141 et seq., claiming a breach by the Company of a collective bargaining agreement (Agreement). The three plaintiffs were members of the employees' Shop Committee created under the agreement executed by the Union with the Company, and they claim the sole right to institute this proceeding as a class action, based on § 301 of the Act[1] (29 U. S. C., § 185).

The District Court, after considering the matter on plaintiffs' motion for order of partial summary judgment and defendant's motion to dismiss, entered an order and judgment dismissing the complaint on the bases "that plaintiffs have failed to state a claim upon which this court can grant relief," that it did not have jurisdiction to grant the relief sought by plaintiffs, and laches. A motion for new trial was overruled and a timely appeal was taken to this Court.

The factual background of the complaint is as follows: The Company maintains and operates manufacturing plants in several states, including Missouri. Its plant at St. Charles, Missouri, was closed February 28, 1963 and similar operations commenced at a new location in Malden, Missouri. The plaintiffs were employed in the Foundry Department of the St. Charles plant, which department constituted a bargaining unit represented by the International Molders and Foundry Workers Union of North America, Local No. 59 AFL-CIO (Union). The Union and Company had entered into a collective bargaining agreement for a two-year period effective March 1, 1961 and extending through February 28, 1963. On December 26, 1962, the Company gave notice of termination of this agreement on the expiration date, February 28, 1963, in accordance with the provisions of the termi-

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[1] All sectional references in this opinion are to sections of the Labor Management Relations Act, 1947, as amended (29 U. S. C., § 141 et seq.)

nation clause contained in Article XIV of the agreement and also in conformity with § 8 (d) (1) of the Act (29 U. S. C., § 158 (d) (1)).[2] Upon being advised of the Company's decision to terminate the agreement because of the Company's proposed and intended termination of all operations at its St. Charles plant and renewal or relocation of operations at Malden, Missouri, the plaintiffs, as members of the Shop Committee, attempted to bargain with the Company respecting its intention to relocate its plant. This attempt to bargain was before the agreement had expired, but the Company refused to so bargain. All foundry unit employees (approximately 220), together with all other units of employment at the St. Charles plant, were terminated on their contract termination dates, and the Company then commenced new operations at Malden, Missouri.

No unfair labor practice was filed with the National Labor Relations Board relative to the Company's unilaterial action in closing the St. Charles plant and relocating at Malden, but the Union filed a suit against the Company on December 26, 1963, in the District Court for the Eastern District of Missouri, based on the relocation of the Company's plant, asserting a breach of the agreement in denying recall privileges, pursuant to Article V, § 3 (f) of said agreement. This suit, No. 63 C 450 (c), was dismissed under a stipulation for dismissal with preju-

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[2] The part of § 8 (d) (1) pertinent to this notice reads as follows:

"* * * *Provided*, That where there is in effect a collective-bargaining contract covering employees in industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;"

dice to the Union plaintiff and at plaintiff's costs on August 26, 1964.

Plaintiffs assert the right to file this action on behalf of themselves as member of the Shop Committee and on the behalf of all other members in their bargaining unit similarly situated on the basis of §§ 8, 9 and 301 of the Act. They contend that their prospective loss of employment through the relocation of the plant gave rise to a grievance, on which they unsuccessfully sought to bargain with the Company under an agreement, and that since the Company refused to so bargain, the Court under the statutory provisions mentioned should enter an order directing the Company, "To commence to attempt a satisfactory settlement of the various grievances alleged herein by bargaining with the plaintiffs * * * as provided in Article III, Sections 3 and 4 of the labor agreement"; and they also request the Court to restore the *status quo ante* to February 27, 1963 of the plaintiffs' employment by payment to plaintiffs and other employees in their unit $150 per week plus accrued interest and that such pay and contractual benefits be paid until such time as the parties have bargained and negotiated a satisfactory disposition of the grievances set out in the complaint. In their motion for partial summary judgment, plaintiffs requested that the amount of $1,185,000 representing approximately one-half of the gross back wages claimed owing to approximately 220 employees for 110 weeks be secured by the posting of collateral by the Company.

Te Company's motion to dismiss the complaint alleges: (1) lack of jurisdiction over the subject matter; (2) the remedies sought by plaintiffs are within the exclusive jurisdiction of the National Labor Relations Board; (3) limitations imposed by § 160 (b) of the Act (6 months); (4) laches; (5) failure to state a claim upon which relief can be granted by the court; (6) *res judicata* based on

the Union's suit against the Company, which was by stipulation dismissed with prejudice, and (7) plaintiffs' lack of capacity to sue for the relief sought.

The District Court (Honorable John K. Regan) in a memorandum opinion filed August 18, 1965 (not reported), overruled plaintiffs' motion for partial summary judgment, sustained defendant's motion to dismiss and entered judgment accordingly. The basis for the opinion was that plaintiffs had failed to state a claim upon which the Court could grant relief. The Court in its opinion pointed out that the agreement was between the Company and the Molders Union, and the Union was not a party to this action; that the plaintiffs as former members of the Shop Committee were not entitled at this time to sue for specific performance, that whatever rights were granted by Article III (grievance procedure) may be enforced only by the Union; and that the plaintiffs lacked standing to sue. The Court also pointed out that arbitration is not required by the agreement and could not be compelled in any event, even by the Union, since the agreement contains no reference to arbitrating any grievance or even dispute concerning the meaning and interpretation of the agreement; there is no provision for compulsory arbitration but only for the voluntary composure of the differences between parties themselves; that the alleged grievances of the plant closing did not come into existence until after the agreement terminated; and finally that laches would apply as a bar, because the plaintiffs by waiting two years to bring this action are not now in a position to seek compulsory discussion with respect to the closing of the plant, since a fundamental change of the relationship of the parties has occurred in the interim, which would make the requested discussion useless. The Court did not rule on the *res judicata* defense as its other ruling were dispositive of the case.

The first question for determination is whether the District Court had jurisdiction to rule upon this dispute. Section 301 (a) of the Act (29 U. S. C., § 185) clearly allows the Union to file a suit for an alleged breach of the collective bargaining agreement.[3] *Textile Workers Union of America v. Lincoln Mills of Alabama,* 353 U. S. 448 (1957); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U. S. 574 (1960); *John Wiley & Sons, Inc. v. Livingston,* 376 U. S. 543 (1964). The law clearly recognizes that in a given factual situation a particular act may be an unfair labor practice as defined by the Act and at the same time constitute a breach of the collective bargaining agreement between the parties. Any complaint about an unfair labor practice, of course, must be directed to the National Labor Relations Board. The Court of Appeals only reviews the findings of the Board with a duty to order enforcement if warranted by substantial evidence on the record. However, if the factual situation also gives rise to a breach of contract action, the aggrieved party is not limited to the National Labor Relations Board. The District Courts have original jurisdition under § 301 to pass upon this contractual dispute independent of any unfair labor practice. As stated in *Smith v. Evening News Association,* 371 U. S. 195, 197 (1962), "* * * The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301." See, *Carey v. General Electric Company,* 315 F. 2d 499 (2 Cir. 1963), cert. denied, 377 U. S. 908.

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[3] § 301

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The question of an unfair labor practice[4] is not before us. The National Labor Relations Board has sole and exclusive original jurisdiction to determine whether the Company's actions violated their duties under the Act, and the Courts have no original jurisdiction to make such a determination. Our sole function is to determine if the plaintiffs are entitled to relief under the specific contractual provisions contained in the collective bargaining agreement.

Though it is well established that a Union may prosecute a breach of contract action under § 301 even though the breach may also involve an unfair labor practice, the right of the individual members of the Union to file this suit independently of the Union has been questioned.

Under certain restricted circumstances the law clearly allows the individual members of the Union to bring an action under § 301 to enforce their individual rights. *Smith v. Evening News Association*, supra; *Republic Steel Corp. v. Maddox*, 379 U. S. 650 (1965); *Belk v. Allied Aviation Service Company of New Jersey, Inc.*, 315 F. 2d 513 (2 Cir. 1963), cert. denied 375 U. S. 847. These cases allow the individual enforcement of rights secured under a collective bargaining agreement after certain prerequisites have been met, such as seeking use of established grievance machinery and affording the Union a chance to act on their behalf. If these conditions precedent to filing the suit have been met, no one could seriously contest the plaintiff's right to individually enforce any contractual rights acquired under the agreement and sue for any breach by the Company that occurred during the

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[4] "§ 8 Unfair Labor Practices

"(a) It shall be an unfair labor practice for an employer—

"(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 159 (a) of this title."

term of the agreement, such as unpaid salary or other monetary claims.[5]

We believe, however, that for an individual to bring an action under § 301 he must be seeking to enforce a right that is personal to him and vested in him at the time of the suit. *Humphrey v. Moore*, 375 U. S. 335 (1964). Therefore, individual suits to compel arbitration of individual grievances are permissible as are individual suits to enforce an arbitration award in which the individual has a personal interest. *Smith v. Evening News Association*, supra. However, whenever the right sought to be enforced is not uniquely personal to the individual but is a right possessed by the bargaining unit as a whole, only the Union as the sole representative of that unit would normally have the standing to enforce the right. Thus the individual would have no standing to compel discussion of broad collective bargaining principles such as the re-negotiation of a new contract or the re-location of a plant, even if such discussion were required by the existing collective bargaining agreement. Section 159 (a) of the Act designates the representatives selected by a majority of the employees in a unit, which in most cases would be a Union, to "be the exclusive elected representatives of all the employees in that unit for the purpose of collective bargaining." It is the Union alone that has the right to bargain with management on these broad policy issues. *May Department Stores Co. v. N. L. R. B.*,

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[5] The plaintiffs' original complaint in paragraph 5 (d) claims that plaintiffs were not paid in full for the vacation credits that they were entitled to under the agreement. They would clearly have a right to sue for these benefits after processing their claim through the grievance procedure set up in the agreement. However, the Company's refusal to process this issue might excuse the employees from exhaustion of the grievance procedure set up in the agreement. *United Steelworkers of America v. American International Aluminum Corp.*, 334 F. 2d 147 (5 Cir. 1964).

We are, however, assuming that plaintiffs have abandoned or waived this issue of accrued vacation pay because no relief was sought in connection therewith or monetary damages claimed.

326 U. S. 376 (1945). Any failure to discuss these matters according to the contract is a violation of the collective rights of the entire unit and not of the personal rights of the individual members. In absence of contrary contractual provisions, it does not appear that the individual employees have a vested interest in the Company's operation being conducted in St. Charles, and, therefore, under the circumstances the Company may close the St. Charles operation completely and relocate elsewhere as its economic judgment dictates without incurring individual liability to each of its employees. *Oddie v. Ross Gear and Tool Company,* 305 F. 2d 143 (6 Cir. 1962), cert. denied 371 U. S. 941.

Even were we to assume that appellants have standing to prosecute this action, we do not believe the agreement entitles appellants to the relief they are seeking. There are two reasons for our belief. One, the agreement does not compel the Company to arbitrate any issue, and two, the agreement does not make this an arbitrable type of issue.

Turning to the agreement in question, it contains in Article IV a No Strike Agreement which is the *quid pro quo* for management's obligations under the Agreement. Article III, on the Grievance Procedure, provides in its essential parts for the adjustment of grievances in a limited fashion and provides three steps, as follows:

> "(1) The Union shall be represented in the shop by the Shop Committee to act with the Foreman in trying to adjust any differences that may arise, and commands the Foreman to attempt satisfactory settlement of the grievance;
>
> "(2) If no satisfactory settlement is reached at stage one, the grievance shall then be considered by the employee, two Shop Committeemen from his shift, plus the Chief Committeeman and the Divisional Su-

perintendent or his representatives, who shall attempt to settle the grievance. The Company shall designate one of its representatives on each shift to discuss and settle any controversy or any grievance that may arise from time to time;

"(3) If no settlement is reached, the grievance shall be reduced to writing and considered by the parties above named, plus the business representative designated by the Union and a representative or officer of the Company. *If they are unable to settle the matter, they shall diligently and in good faith explore some other method for the final disposition thereof.*" (Emphasis supplied.)

There is no agreement contained within the collective bargaining contract to submit any question of interpretation of the contract to arbitration, nor is there any agreement to settle disputes thereunder by submission to an arbitrator or some other board.

The cases of which we are aware clearly allow the specific enforcement of an agreement to arbitrate and compel implementation of an arbitration award. *Textile Workers Union of America v. Lincoln Mills of Alabama*, supra; *Smith v. Evening News Association*, supra; *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960); *Builders Association of Kansas City v. Greater Kansas City Laborers District Council*, 326 F. 2d 867 (8 Cir. 1964), cert. denied 377 U. S. 917; *Minnesota Joint Board v. United Garment Mfg. Co.*, 338 F. 2d 195 (8 Cir. 1964); *United Brick & Clay Workers v. A. P. Green Fire Brick Co.*, 343 F. 2d 590 (8 Cir. 1965); *Fibreboard Paper Products Corporation v. East Bay Union of Machinists*, 344 F. 2d 300 (9 Cir. 1965), cert. denied 382 U. S. 826.

Appellants herein, however, are not seeking the specific enforcement of a compulsory arbitration contract. They

are seeking the specific enforcement of the general agreement to discuss grievances. Unlike the cases cited above, the equity powers of the Federal courts should not be used to specifically enforce a contract under § 301 that merely requires the parties to discuss their differences. It thus appears that there is a fatal defect in the collective bargaining agreement, itself, in that there is no provision for compulsory arbitration, whch would be the only method of finally settling disputes thereunder, absent agreement and absent submission to the courts. Therefore, we believe that a binding agreement to submit a dispute to arbitration or a final and binding arbitration award is a predicate to granting the kind of relief plaintiffs are seeking under § 301. See, *General Drivers etc. Union No. 89 v. Riss & Company, Inc.*, 372 U. S. 517 (1963).

The second reason why plaintiffs could not be afforded relief under this contract is that the grievance procedure set out in the contract does not cover this type of dispute. It is true that *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960) provides, at page 578, that the collective bargaining agreement is more than a contract, "* * * it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." And at page 581:

> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement."

Nonetheless, we think it is patently clear that the renegotiation of a new contract or policy questions on plant relocation could not be settled by the foremen or any representative of the Company appointed to hear individual grievances as contemplated by the procedure

set up in this agreement. It is obvious that the grievance machinery set up in the contract was intended to cover day-by-day disputes involving working conditions, safety hazards, etc. Bargaining over broad questions of policy is vested solely in the Union. *May Department Stores Co. v. N. L. R. B.*, supra. Construing the collective bargaining agreement most liberally, the type of grievance here pled, a plant relocation upon termination of a collective bargaining agreement, is in no way contained within the framework of the agreement. The employer has no duty to arbitrate issues that it has not agreed to arbitrate and whether arbitration is required under the collective bargaining agreement is a legal issue for the Court to decide. See *John Wiley & Sons, Inc. v. Livingston*, 376 U. S. 543, at page 547.

We, therefore, agree with the District Court, that the complaint fails to state a claim upon which the District Court could grant relief.

There are serious questions of whether the Union suit is *res judicata* on the issue here involved, and also whether or not the doctrine of laches should be applied. Inasmuch as these questions are not necessary for determination of the case, we will not attempt to deal with these problems in this opinion.

We affirm the District Court in granting judgment against plaintiffs. This disposition of the case renders unnecessary discussing the relief requested.

Judgment affirmed.

APPENDIX B.

Petition for Rehearing.

(Filed on .... September, 1966.)

The appellants respectfully petition this Honorable Court for a rehearing of the appeal in this cause, and in support of this petition represent to the Court as follows:

Appellants reserve their argued position as to each of the points of appeal. In this petition appellants address themselves solely to those features of this Court's decision wherein they believe that the Court may be convinced that the result herein is based upon an erroneous application of certain relevant facts and controlling matters of law.

Appellants respectfully request the Court to re-consider its decision in reference to the following facts and the law applicable thereto which were overlooked:

1. The Court consistently classified these plaintiffs merely as "members" of the union and as "individuals" enforcing "individual rights" (Court's Opinion, pages 5, 7, 8 and 9). This erroneous classification overlooks the fact that the named plaintiffs were "members of the employees' Shop Committee created under the agreement" (Court's Opinion, page 2). Plaintiff, Holden Brown, was the "Chief Committeeman" of this Shop Committee (R. 4, Complaint, Paragraph 2 (d).). The labor agreement between the parties placed special significance onto this Shop Committee. This Committee **represented the** Union in the Shop (R. 15, Section 2; R. 16, Section 6, labor agreement). The Committee had the sole right under the first two steps of the Grievance Procedure (R. 15,

Section 3, and R. 16, Section 4), to attempt to settle grievances. These plaintiffs therefore should not be classified as mere members or individuals for the purposes of this litigation. They are the vital "Shop Committee" which must initiate the grievance process (R. pages 37 and 38, Plaintiffs' Affidavit).

2. The labor agreement between the Company and Union expired on February 28, 1963, and was not renewed (Court's Opinion, pages 2 and 3). This finding raises the issue of what rights survived and whose rights were they? Only these employees had surviving rights. The class represented by these plaintiffs had surviving rights under the Grievance Procedure (R. 15, Article III); to Seniority claims (R. 17, Article V with recall privileges as set out in sub-paragraph (f), R. 19 and 20); Vacation Pay claims (R. 24 and 25, Article IX) and Health Insurance and Pension claims (R. 25 and 26, Articles X and XII). This Court previously cited, with approval, the excellent analysis of rights which survive the termination of a labor agreement in the opinion of District Judge Parsons in the case of Piano and Musical Workers Union v. W. W. Kimball Company, 221 F. Supp. 461, N. D. Illinois. This authoritative citation of the Piano Workers case was in the landmark decision of this Court outlining rights which survive a labor agreement expiration in the case of Minnesota Joint Board, etc., v. United Garment, etc., 338 F. 2d 195 at 201.[1] Another thorough analysis of the capacity of these plaintiffs to bring this action and their right to

[1] The District Court decision in the Piano Workers case was dated September 13, 1963. This decision was overruled by the Seventh Circuit Court of Appeals in its opinion dated June 30th, 1964 (333 F. 2d 761). This Court, however, obviously preferred the holding of District Judge Parsons by authoritatively citing his opinion on November 9, 1964, in the Minnesota Joint Board decision. The United States Supreme Court clearly supported this stand when it reversed the Seventh Circuit Court of Appeals and reinstated the decision of Judge Parsons on December 14, 1964 (379 U. S. 357; 85 S. Ct. 441 (1964)).

the relief which they seek is outlined in the case of Serra v. Pepsi-Cola Bottlers, Inc., 248 F. Supp. 684.

(a) This Court has found that the "Plaintiffs have abandoned or waived" the issue of accrued vacation pay (Court's Opinion, page 8, ft. nt. No. 5). This finding overlooks the fact that Plaintiffs' Complaint stated that the defendant failed and refused to bargain with the plaintiffs in violation of the labor agreement over this grievance (R. 6, paragraph 5, and 5 (d)), and plaintiffs prayed for relief in the form of Judgment against the defendant that it "be ordered to commence to attempt a satisfactory settlement of the **various grievances** alleged herein" (R. 8, subparagraph (b)).

(b) The Court finds on page 11 of the opinion that it cannot "specifically enforce a contract under Section 301 that merely requires the parties to discuss their differences". This finding, as it relates to all of the issues raised for reconsideration in this petition, overlooks the fact that the Grievance Procedure clause in this labor agreement is exactly what these parties bargained for. The Grievance Procedure does not rule out arbitration as an ultimate method of settling the "differences", "grievances" or "any controversy" that may arise (R. 15 and 16, Grievance Procedure). The Grievance Procedure clause clearly states in Section 5 (R. 16), that "If they are unable to settle the matter, they shall diligently and in good faith explore some other method for the final disposition thereof." This sentence would compel the parties to consider (and probably resort to) arbitration if all prior adjustment, consideration and discussion (paraphrasing the words of the Grievance Procedure clause), in attempting settlement should fail (General Drivers Union v. Riss Co., 372 U. S. 517, 83 S. Ct. 789 at 791).

3. The entire thrust of this Court's Opinion totally overlooks the teaching of the United States Supreme Court that the facts in this case of plant relocation with loss of employment to these plaintiffs are such to compel mandatory (statutory) bargaining by this defendant before it can so drastically affect the "terms and conditions of employment" of these plaintiffs. (Fibreboard Paper Products v. N. L. R. B., 379 U. S. 203, 85 S. Ct. 398 (1964)); Fibreboard Paper Products v. East Bay Union of Machinists, 344 F. 2d 300, cert. den. 86 S. Ct. 61; Local #24 Teamsters v. Oliver, 75 S. Ct. 297; Textile Workers Union v. Darlington Mfg. Co., 85 S. Ct. 994 (1965). The Supreme Court teaching in these cases is exemplified in the following excerpts from an article in 18 Vanderbilt Law Review 1588 (October 1965), "Labor-Law—Failure to Bargain—Employer Required to Bargain With Respect to His Proposal to Contract Out Work":

(a). At page 1592—"The Court did not rely upon precedent in reaching its decision (in Fibreboard), although it did cite with approval the Timken and Oliver cases, and stated that it agreed with the holding in these cases that 'such a matter is subject to mandatory bargaining'."

(b). At page 1595—"An important secondary aspect of the instant case (Fibreboard) is the impact it may have on an arbitrator's decision as to the right of a Company to 'contract out' during the life of an agreement. While this is a complex question the answer seems to be that the decision of the arbitrator should be no different after Fibreboard than before, assuming identical facts. The answer is largely due to the fact that the decision did not change existing law, for as it has been pointed out above, the law prior to Fibreboard was that 'contracting out' was a subject for mandatory bargaining. (Footnote #47—citing Feller and Fairweather.

The Fibreboard Decision and Subcontracting: Two Views, 19 Arb. J. (n. s.) 70 (1964). This article contains an excellent and complete discussion of the instant case.)''

Appellants cite these two excerpts to point up that the failure and refusal of the Company to bargain with these employees can and does constitute a breach of the statutory as well as the contractual rights of the employees. This Court specifically reiterated the unassailable fact in this case that "the plaintiffs, as members of the Shop Committee, attempted to bargain with the Company respecting its intention to re-locate its plant, This attempt to bargain was before the agreement had expired, but the Company refused to so bargain'' (Court's Opinion, page 3). Didn't this refusal of the Company constitute a dispute or difference between the Company and its Shop Committee during the life of the agreement? Aren't these plaintiffs ("individual employees" included) compelled to "attempt use of the contract grievance procedure agreed upon by the employer and union as the mode of redress"? (Republic Steel v. Maddox, 85 S. Ct. 614 at 616, I.). Haven't these plaintiffs been abandoned by their union (Court's Opinion, page 3), which "only perfunctorily" (Maddox Opinion, page 616), pressed their claim?[2] Doesn't the broad form, mandatory Grievance Procedure (R. 15, 16 and 17) clearly cover submission of "any difference that may arise;" "any controversy or

[2] The union's bizarre conduct in this case serves only the purpose of eradicating the defenses of laches and res judicata (Court's Opinion, pages 12 and 13). The Company was sued by the Union ten months after the re-location of the plant (Court's Opinion, pages 3 and 4). The dismissal of the Union's suit was followed seven months later with this litigation (R. Docket Entries). The Company could never prove laches inasmuch as it was only free from litigation over its decision to shut down for a period of seven months. The Company never recognized these plaintiffs as parties to the Union's suit thus barring the defenses of res judicata (R. 47, 48, Paragraph 8 of Company's pleaded Answer to Union's Complaint).

grievance that may arise from time to time"? Appellants are at a loss to understand how this Court found any basis in the facts or the law of this case to assert that "the individual would have no standing to compel discussion of broad collective bargaining principles such as the re-negotiation of a new contract or the re-location of a plant" (Court's Opinion, pages 8 and 9); or further, "there is no agreement contained within the collective bargaining contract to submit any question of interpretation of the contract to arbitration" (Court's Opinion, page 10); or further "that the grievance procedure set out in the contract does not cover this type of dispute" (Court's Opinion, page 11); or further that "It is obvious that the grievance machinery set up in the contract was intended to cover day by day disputes involving working conditions, safety hazards, etc." (Court's Opinion, page 12). These frankly amazing findings are made in the teeth of a grievance clause that obviously includes everything, excludes absolutely nothing and is mandatory in every sense of its wording.

4. Appellants' final contention in this petition is a total disagreement with the applicability of the facts of this case to the cases of May Department Stores v. N. L. R. B., 326 U. S. 376 (1945); 66 S. Ct. 203 (Court's Opinion, pages 9 and 12); and Oddie v. Ross Gear, etc., 305 F. 2d 143 (6th Cir. 1962), cert. den. 371 U. S. 941 (Court's Opinion, page 9). Appellants will treat the misapplication of these cases separately. However, the Supreme Court ruling in Republic Steel v. Maddox clearly and specifically reserved to individuals the right to assert contract grievances under defined circumstances (85 S. Ct. at 616 and 617; I. and 619, III):

> (a) The 1965 Republic Steel v. Maddox decision clarifies exceptions to the general rule of May Co., (supra) enunciated twenty-one (21) years ago. There is no reasonable comparison between the facts of the

May Co., decision and the facts of this case. Especially is this true when the cases are compared on the further qualification that these appellants have been abandoned by their Union (R. 49-50), and the contract had been allowed to expire (Court's Opinion, pages 2 and 3).

(b) The holding of the Sixth Circuit in Oddie v. Ross Gear (supra), has been frequently directly and indirectly compared to the holding of the Court of Appeals and the District Court in the Second Circuit case of Zdanok v. Glidden, 181 F. Supp. 441, reversed 288 F. 2d 99 (limited certiorari, U. S. Supreme Court 82 (a), S. Ct. 1459); Second District Court trial, 216 F. Supp. 476, 327 F. 2d 944, cert. den. 84 S. Ct. 1338. The applicability of Zdanok v. Glidden (supra), rather than Oddie v. Ross Gear (supra), to the facts of this case are best outlined in the following cases:

1. Piano Workers Union v. W. W. Kimball Co., 221 F. Supp. 461 (the opinion of District Judge Parsons highlighted in footnote No. 1, page 20 of this petition).

2. John Wiley, etc. v. Livingston, 313 F. 2d 52 at 58 and 59 (footnote No. 4), 84 S. Ct. 909.

3. Zdanok v. Glidden, 216 F. Supp. 476 at 478 and 479 (Second District Court decision).

Appellants respectfully submit that each of the three (3) above cited decisions were written and published **after** the Oddie v. Ross Gear (supra), decision.

In conclusion, appellants urge that all other findings in this Court's Opinion herein pose questions of "procedural arbitrability". These "procedural disputes relating to arbitrability are for the arbitrator, not the court to decide" (Local Union No. 51, etc. v. Illinois Power Co., 357 F. 2d 916 (1966) at 918 and 919). The

dispute settlement forum to which these parties are contractually bound must itself resolve what grievances these parties will attempt to satisfactorily settle and diligently and in good faith explore the "method for the final disposition thereof" (R. 16, Grievance Procedure, Section 5). The orders of this Court are necessary to put this machinery into motion.

For all of the foregoing reasons the appellants respectfully pray that this petition for rehearing be granted.[3]

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[3] Appellants call to the Court's attention that this case is companion in some respects, to the case of Woody et al. v. Sterling Aluminum Co., No. 18,083. The opinion of Judge Mehaffey of this Court in the Woody case was published on September 2, 1966. The Woody Opinion specifically refers to the decision in this case (Woody Opinion, pages 11 and 12, footnote No. 8). This Court has ordered the time extended to file a petition for rehearing in the Woody case until October 4, 1966. The Woody petition for rehearing will be filed on or before that date. Appellants respectfully urge that this Court also consider the Woody case petition for rehearing in those areas where the rulings are similar to the existing rulings in this case. Appellants also respectfully urge consideration of this petition and the forthcoming Woody petition by the Court en banc in accord with Rule 15 (e) of this Court.

United States Court of Appeals
For the Eighth Circuit.

September Term, 1966.

No. 18,218.

Holden Brown, et al., Appellants, v. Sterling Aluminum Products Corporation.	Appeal from the United States District Court for the Eastern District of Missouri.

There is before the Court appellants' petition for rehearing en banc and on consideration of such petition, it is the order of the Court that the petition for rehearing en banc be, and it is hereby, denied.

It is further ordered that the petition for rehearing be, and it is hereby, denied.

October 7, 1966.